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August 6, 1985

Ms. Betsey Bayless, Director
Department of Administration
1700 West Washington, Room 809
Phoenix, Arizona 85007

Re: 185-098 (R85-065)

Dear Ms. Bayless:

This is in response to a letter of April 18, 1985, in which your predecessor asked whether the continued payment of a "special performance award", as defined by A.C.R.R. R2-5-101.60, to a recipient of the award is contingent upon the employee remaining in state service throughout the duration of that time set for the installment payment of the award.

The definition of a special performance award is set forth at A.C.R.R. R2-5-101.60 and reads as follows:

"SPECIAL PERFORMANCE AWARD" means a performance award beyond the maximum range of the paygrade which increase is not automatically continued or added into the salary base, but must be re-earned. Such an award may be granted on a single-payment basis or on an installment basis corresponding to an agency's pay schedule.

Reference to a special performance award is also made at A.C.R.R. R2-5-502(E)(3)(b) which reads as follows:

An employee who has attained step sixteen shall be eligible, annually, for consideration by the agency for a special performance award increase of 2.5% or 5% to

be effective on the first day in January based upon the standards of performance or efficiency established for the position.

An employee at step sixteen who receives a special performance award shall retain the award until the next January, after which time the employee's salary shall be reverted to step sixteen, unless another special performance award is granted for that year.

The definition of a special performance award and subsequent references to special performance awards within A.C.R.R. R2-5-502, et seq. (salary plans), fails to set forth any contingent requirement or condition that the recipient of a special performance award must continue in state service in order to qualify for a lump sum or installment payment which was previously awarded. Such a condition may have been the implicit intent of the drafters of the administrative rules and regulations but such an intent can not be discerned from the clear language of the applicable rules.

Significantly, the definition of the special performance award provides the explanation that the award "is not automatically continued or added into the salary base [of the employee], but must be re-earned." The logical inference from this definition is that a special performance award is a form of financial consideration paid to the state employee for prior exceptional job performance. The fact that the state agency making the award may select between a lump sum or installment payment does not implicitly suggest that the termination of state employment will cut off the employee's right to payment of the special performance award.

The state employee's salary and the regulations governing compensation payable to the employee form part of the contract between the state and the employee. Upon the granting of the special performance award by a state agency, the employee's right to the award vests and can not be revoked. Authority for this conclusion can be found by analogy to the supreme court decision in Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (1965).

In Yeazell the court ruled that the rights and responsibilities arising out of a contract of employment are firm and binding and controversies concerning those rights

Ms. Betsey Bayless
August 6, 1985
Page 3

should be resolved by reference to the law applicable to contracts. Id. at 114. The court noted that once an employee makes an election as to his pension rights, his contractual rights are established and are binding thereafter. Id. at 117. The logical implication is that when a state agency elects to grant a special performance award, that decision is binding and the employee's contractual right is established.

Therefore, a state agency that seeks to withhold payment of the award, because the recipient of the special performance award terminates state employment, lacks authority for such action based upon the current administrative rules and regulations. At the same time we find nothing in the rules or regulations, or applicable case law that would prohibit the agency from discharging its obligation in a lump sum payment at the time of termination.

Sincerely,



BOB CORBIN
Attorney General

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